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Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, et al.,
Petitioners,
vs.
NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Section 242(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(1), authorizes the Attorney General, "[p]ending a determination of deportability," to release persons arrested "under bond in the amount of not less than $500 with security approved by the Attorney General containing such conditions as the Attorney General may prescribe." The questions presented are:

1. Whether the language and legislative history of section 242(a) discloses an intent to limit the Attorney General's power to detain arrested persons to those situations where detention is necessary to ensure future presence, or to protect the national security or public safety?

2. If section 242(a) does permit the imposition of bond conditions unrelated to appearance, the national security or public safety, whether the section permits a regulation which, in a blanket, non-individualized manner, (i) imposes a bar to employment in all delivery and appearance bonds for persons <u>charged</u> with being deportable, (ii) requires persons arrested but not yet found deportable to establish a "compelling" need to work in order to rescind the employment bar, and (iii) requires detention without bond when someone is <u>suspected</u> of working without authorization in violation of the employment bar?

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STATEMENT OF THE CASE

A. The Challenged Regulation

Pursuant to 8 U.S.C. § 1252, agents of the Immigration and Naturalization Service (INS) arrest persons believed to be present in the United States in violation of the Immigration and Nationality Act (INA or Act). While approximately 97.5% of all such persons opt for immediate "voluntary departure" from the country, those who do not are typically released on bond pending deportation proceedings.

In 1983, the INS promulgated a regulation that directed its agents to release persons pending deportation proceedings only on condition that they not work. 8 C.F.R. § 103.6(a)(2). The regulation provides:

> A condition barring employment shall be included in an appearance and delivery bond in connection with a deportation proceeding *** Only those aliens who . . . establish compelling reasons for granting employment authorization may be authorized to accept employment.

8 C.F.R. § 103.6(a)(2) (1983) (emphasis added). The person seeking to have the "no work" bond condition lifted "will have the burden [following release] of going forth with the application to the district director ... Where the 'no work' condition is violated, the appropriate response would be to take the alien into custody." Pet. App. 141 (emphasis added). There are no standards (or hearing of any type) to determine whether the employment is indeed unauthorized. In contested deportation cases this will typically depend on the later outcome of the hearing. INS agrees its regulation will result in a "substantially larger" number of people being detained. Pet. App. at 17a, n. 7.

The district court noted that "all aliens who post bond are automatically subjected to the no-work [bond] condition ... At a minimum, [such] individuals ...

will be unable to work and support themselves until the District Director ... determines that they may do so." Pet. App. 116a (emphasis added).

The regulation and INS's internal Operating Instruction simply bar "employment," not "unauthorized employment." The ten named plaintiffs who were issued bonds were barred from employment, not "unauthorized" employment. J.A. 34-40. The district court concluded that the bond rider inserts "a condition barring employment ..." J.A. at 50. The court of appeals concluded "[i]n the text of the regulation and when put into operation on the face of the bonds, the condition refers broadly to 'employment.'" Pet. App. at 7a (emphasis added).

The challenged regulation permits rescission of the work prohibition only if "compelling reasons" are shown. 8 C.F.R. § 103.6(a)(2)(iii). If compelling reasons are shown, the person "may be authorized to accept employment ..." Pet. App. at 138a.

A previous regulation, not challenged in this case, had provided that, in the discretion of the INS, a condition barring "unauthorized employment" could be imposed in individual appearance bonds. 8 C.F.R. § 103.6(a)(2)(ii), (3)(iii) (1974). The 1983 regulation made several changes to the 1974 regulation: It bars "employment" rather than "unauthorized employment," removes individualized consideration, requires a showing of a "compelling" need to work before the condition may be rescinded, and forfeiture of the bond amount, not detention, was the permissible response to alleged unauthorized employment. *Matter of Toscano-Rivas*, 14 I&N Dec. 523 (B.I.A. 1972), *reconsidered*, 14 I&N Dec. 538 (B.I.A. 1973), *aff'd on other grounds*, 14 I&N Dec. 550 (A.G. 1974).[1]

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1 Prior to 1983 the INS "emphatically disavow[ed]" any intention of detaining aliens who worked without authorization. *Id.* at 542.

B. Early District Court and Court of Appeals' Proceedings

On December 6, 1983, plaintiffs filed this action challenging the 1983 regulation on statutory and constitutional grounds. J.A. 18-23. In an amended complaint, ten additional individuals were added as plaintiffs. J.A. 34-41. Four had been released on bonds containing "no work" conditions pending deportation hearings. J.A. 34, 36-37. The remaining plaintiffs were in detention, unable to secure release because bonding companies would not post security for bonds containing the "no work" rider. *Id.* at 35-40.

The evidence established the following:

1. The "no work" bond rider made it virtually impossible for class members to bond out of detention regardless of their likelihood to appear in future proceedings. The majority of people obtain their release through bonds posted by surety companies. Reporter's Transcript (12-16-83) (RT II) at 46 and 62; C.R. 16, Ex. LL; C.R. 4, Ex. B, ¶ 4. Surety companies would not write bonds containing "no work" riders. C.R. 4, Ex. R ¶ 6,,Ex. S, ¶ 6. *See also* Decision of Court of Appeals, Pet. App. at 15a, 16a, n. 7 (same). "The INS did not contest these claims." Pet. App. at 15a.

2. Prior to implementation of the 1983 regulation the prospect of employment, whether "authorized" or not, had always been one of the "most significant" factors supporting release pending the outcome of deportation hearings. C.R. 4, Ex. E, ¶ 3. *See also* Decision of the Court of Appeals, Pet. App. 34a-35a.

3. The challenged regulation will force people to abandon their statutory and constitutional rights to deportation hearings. C.R. 4, Ex. C, ¶ 3, Ex. D, ¶ 6. It will also significantly increase the number of people forced to appear in proceedings without representation. C.R. 4, Ex. B, ¶ 4(a), Ex. D, ¶ 8, Ex. E, ¶ 6; C.R. 16, Ex. HH; RT II at 134.

4. The regulation as proposed and issued was justi-

fied as a means to combat the "adverse effect of the aliens' employment on U.S. citizens . . ." Proposed Rule, Fed. Reg., Vol. 48, No. 42, page 8820; Pet. App. 139a (final rule).[2] However, the evidence indicates the regulation bears no rational relationship to its intended purpose.[3] Dr. Patricia Hernandez Kelly, an expert on labor migration, described the effect of the regulation akin to "throwing dice." RT II at 114, 116 (emphasis added). Dr. Rebecca Morales, another migration expert, declared that the effect could just as easily be the loss of jobs for United States citizen workers by negatively effecting certain industries and causing their closure. C.R. 4, Exhibit Q.

Based on this record the district court issued a preliminary injunction. Pet. App. at 109a-118a. The court noted that while INS contended "that detained individuals do not have a right to work because of their status as illegal aliens, ... this argument assumes the

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2 INS now states that the challenged regulation is "also [meant] to remove an incentive to delay deportation proceedings when an alien is apprehended." Pet. Bf. 6. However, the penalty imposed by INS's regulation does not distinguish between "delays" in expulsion fully justified because the person might not be an alien, or may not be a deportable alien, and those not similarly justified; nor, for that matter, who is to blame for the delay. At least one recent study suggests that the INS and immigration courts, not those subjected to deportation proceedings, bear most of the blame for delays in concluding hearings. *See, e.g.*, Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court*, 2 Int'l J. Refugee L. 252, 259-60 (1990) ("majority" of delays caused by Government).

3 Although the INS justified the new regulations as preserving employment for American workers, the regulations eliminated all but one of the labor market considerations set out in the 1974 regulations *See* 8 C.F.R. § 103.6(a)(2)(ii); 48 Fed.Reg. at 8820 (1983).

very fact which the government has the burden of proving and has not yet done so." *Id.* at 116a. The court of appeals affirmed in all pertinent respects. *Id.* at 96a-108a.

On remand the district court granted plaintiffs summary judgment on the ground that the regulation exceeded the statutory authority granted in INA § 242(a). *Id.* at 81a-95a. The district court noted that the challenged regulation prohibited all employment, not just "unauthorized" employment, and the condition was imposed "on all aliens who are released on bond" in a "blanket" manner without any individualized consideration. Pet. App. at 81a, 95a (emphasis added). *See also* J.A. 50-58 (Findings of Fact and Conclusions of Law).

The court of appeals affirmed. Pet. App. at 71a-80a. The INS petitioned for a writ of certiorari. This Court vacated and remanded "for further consideration in light of" IRCA. *Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 481 U.S. 1009, 1009-1010 (1987).

C. The Intervening Passage of IRCA

Title I of IRCA adds 8 U.S.C. § 1324a, which imposes penalties on employers who knowingly hire aliens not authorized to be employed in the United States. The language and legislative history of IRCA illustrate that Congress intended to control aliens' employment exclusively through such sanctions. *Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary*, House of Representatives, 92d Cong., Serial No. 13, pts. 1-5, pt. 1 at 46 [emphasis added] ("1971 Hearings"); H.R. Rep. No. 99-682(I) at 51-55, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5649, 5655-60. In fact, Senator Simpson, the primary author of IRCA, specifically rejected a proposal that instead of penalizing the employers of unauthorized aliens, the aliens them-

selves be detained to deter illegal entry for the purpose of working. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45. Senator Simpson criticized the proposal as being "politically harsh, . . . [and] unrealistic . . ." *Id.* at 56. IRCA also continued in effect the provisions of the INA which permit aliens to obtain visas and even relief from deportation regardless of prior unauthorized employment.

D. Post-IRCA District Court and Court of Appeals Decisions

On remand the district court concluded that "the [challenged] bond regulations are aimed at employees, whereas the sanctions in the IRCA target employers." Pet. App. at 70a. The court of appeals again affirmed. First, the court of appeals addressed the question whether the regulation barred employment or "unauthorized employment," and concluded, as had the district court, that it bars all employment. Pet. App. 9a.[4] Next, the court analyzed who was subject to the bond condition and concluded, as had the district court, that it applied to "all those released on bond ..." *Id.* at 10a (emphasis added). Turning to whether "this is a 'blanket provision' [as found by the district court] or a system of individualized determinations," as argued by the INS, the court of appeals held: "This is a blanket condition." *Id.* at 17a-18a.

Turning to the merits, the court of appeals examined the legislative history of § 242, *id.* at 20a-33a, and concluded that INS's detention powers are

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4 The appearance bonds issued by the INS to the named plaintiffs after the challenged regulation went into effect barred employment: "Employment not authorized" and "No employment authorized." *See* attachments to plaintiffs' letter filed Nov. 9, 1989, pursuant to Rule 28(j), Federal Rules of Appellate Procedure.

limited to "the type of harm or danger contemplated in the grant of [the] detention power," *id.* at 33a; nothing in the Act authorizes "detention in relation to employment;" and "nothing suggests the appropriateness of blanket employment-related conditions." *Id.* at 34a (emphasis in original).

Judge Trott issued a short dissent, quoting only one sentence from the legislative history of the 1952 Act. Pet. App. at 58a. However, as with INS's use of the same quote, Pet. Bf. at 27, the significant part of the sentence is dropped. The dissent states that a major purpose of the 1952 Act is to "provide for the protection of American labor ..." Pet. App. at 58a (quoting H.R.Rep. No. 1365, 82d Cong.2d Sess. 51 (1952). Actually, the sentence in the House Report reads: "It is the opinion of the committee that this provision [§ 212(a)(14) which requires that some aliens obtain labor certificates prior to their visas] will adequately provide for the protection of American labor ..." H.R.Rep. 1365 at 1705 (emphasis added).

INS concedes that "the text of the regulation is not unambiguous ..." Pet. Bf. 23 n. 14. Judge Trott agreed: "I am not sure what this case is about." *Id.* . The INS in its brief "assures us that the disputed regulations 'bar only unauthorized employment' * * * I suppose its none of my business, but it seems the way out of this power struggle is for the INS to cure the ambiguities in its regulatory scheme so that the regulations accurately reflect its objective ..." *Id.* at 60a (emphasis added).

SUMMARY OF THE ARGUMENT

I.1 All available authority indicates that the "conditions" the INS may impose under section 242 must be individualized and reasonably related to the alien's availability for hearings, the national security or public safety. *See, e.g.,Carlson v. Landon*, 342 U.S. 524 (1952). *United States v. Witkovich*, 353 U.S. 194 (1957). INS and the Attorney General recognized this

principle in *Toscano-Rivas*, 14 I&N Dec. at 550.

2. In the 1952 Act Congress did not make unauthoriz-ed employment illegal. Provisions relating to relief from deportation and the granting of visas were completely available regardless of prior "unauthorized employment." *See, e.g.*, 8 U.S.C. §§ 1252(b), 1254, 1255, 1259. As this Court has pointed out, "[t]he INA [of 1952] evinces 'at best evidence of a peripheral concern with employment of illegal entrants.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (emphasis added) (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)). "[T]he employment relationship between an employer and an undocumented alien is hence not illegal under the INA . . ." *Id.*

3. The INS claims authority to detain whenever detention is "designed to serve any of the policies" of the INA. Pet. Bf. 14. However, each ground of exclusion and deportation expresses a broad policy of the INA. Under INS's interpretation of § 242, it would "serve[] . . . the policies of the [INA]" to detain all people suspected of continuing to hold the status which justifies placing them in proceedings.

4. The INA provides that in deportation hearings the INS bears the burden of proof. INA § 242(b)(4), 8 U.S.C. § 1252 (b)(4); *Woodby v. INS*, 385 U.S. 276, 488 (1966). Contrary to this burden of proof, the challenged regulation presumes that plaintiffs and their class members are deportable aliens and therefore can automatically be barred from working and jailed indefinitely if suspected of working without authorization. The work authorization form which plaintiffs must file in order to terminate the "no work" bond rider requires the applicant to list his place of birth and date, place and manner of entry. *See* INS Form I-765. These forms are then used by the INS to meet its burden of proof. 8 C.F.R. § 242.14. The regulation vitiates the statutory burden of proof.

5. Further indicating that Congress did not intend

to delegate the detention powers assumed by the INS under § 242(a), is the language in § 242(c) concerning aliens found deportable. Unlike § 242(a), § 242(c) specifically permits "release[] on such other conditions as the Attorney General may prescribe." The "other conditions" language is absent from section 242(a). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally ...'" *Russello v. United States*, 464 U.S. 16, 23 (1983).

II.1. Section 242(a) originated as Chap. 29, § 20 of the Immigration Act of 1917. Section 20 provided that "[p]ending the final disposal of the case of any alien ... he may be released under bond ... conditioned that such alien shall be produced when required for a hearing ..." Act of 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917) (emphasis added). Nothing in the language of the 1917 Act indicates that Congress intended to authorize the use of bond authority to control alien employment.

2. H.R. 10, a bill never enacted, was intended "to facilitate the deportation of aliens from the United States," H.R. Rep. 1192, 81st Cong., 1st Sess. (1949), not to control their employment. While its early versions permitted detention without bond for several classes of deportable aliens, including aliens "who entered the United States within ten years preceding the issuance of the warrant of arrest," H.R.Rep. 1192 at 3, by 1950 the version of the bill introduced in the House only authorized detention without bond for criminal and subversive aliens already found deportable. 96 Cong. Rec. 10449 (1950). Representative Hobbs, author of H.R. 10, did not intend the proposed legislation to result in detention without bond for persons, like plaintiffs, charged in deportation proceedings, but only "those that have been finally ordered [deported]." 96 Cong. Rec. 10674 (1950). Furthermore, detention under H.R. 10 was

viewed as a mechanism to effect deportation, not as a mechanism to allow the INS to further other broad purposes of federal immigration policy. 96 Cong. Rec. 10456 (1950) (remarks of Rep. Hobbs).

3. The history of section 23 of the Internal Security Act of 1950 indicates that its purpose was to "deport all alien Communists as a menace to the security of the United States . . ." *Carlson*, 342 U.S. at 541. Section 23, the immediate precursor of § 242(a), read: "Pending final determination of the deportability of any alien ... such alien may ... be released under bond ... It shall be among the condition of any such bond ... that the alien be produced ... when required to do so ..." SACA § 23, *reprinted in* 1950 U.S.Code Cong. & Ad. News 984, 1006. The purpose of the section was to "facilitate the deportation of ... deportable aliens," H.R.Conf.Rep. No. 3112, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. & Ad. News 3886, 3899, 3911, not to control alien employment.

4. The only statement in the House Report regarding detention powers under § 242(a) is that "[t]his provision, in general, follows the procedure establish-ed in section 23 of the Subversive Activities Control Act of 1950." H.R.Rep. No. 1365 at 1711. There is no indication that people facing deportation could be detained without bond for allegedly working without authorization. Congress did state that enactment of 8 U.S.C. § 1182(a)(14), which requires some aliens to receive "labor certificates" in order to obtain visas, would "adequately provide for the protection of American labor against an influx of aliens ..." H.R.Rep. 1365 at 1705 (emphasis added).

5. The legislative history of INA § 103 fails to support INS's regulation. Under § 103 Congress intended only that the Attorney General be "charged with primary responsibility for the administration and enforcement *of the provisions of the bill* . . ." H.R.Rep. No. 1365 at 1687 (emphasis added). While § 103 may

grant authority to further immigration policy through regulations, that authority does not extend to the issuance of regulations impermissible under the INA.

6. Enactment of IRCA further establishes the impropriety of the challenged regulation. Under IRCA applicants for legal status are required to "demonstrate[] a history of employment" in the United States. 8 U.S.C. § 1255a(d)(2)(B)(iii). The "employment" required to qualify is always unauthorized.

IRCA adds to the Act 8 U.S.C. § 1324a, which penalizes *employers* who hire undocumented aliens. 8 U.S.C. § 1324a(a)(1). Congress specifically considered and rejected detention of illegal aliens as a control on unauthorized entry and employment. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45, 56.

III. A statute must be construed, if fairly possible, so as to avoid the conclusion that it is unconstitutional. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set out the test by which to determine what process is due. *Id.* at 335.

This case involves detention without bond. "No right is held more sacred ... than the right of ... free[dom] from all restraint ... unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

INS does not deny the risk of erroneous deprivation. It however asserts that erroneous deprivation will be "rare." Pet. Bf. at 25, n. 16. It will only be as rare as INS limits its arrests to deportable aliens. The vast majority of INS arrests are conducted without warrant during work place "raids" in which "conditions are understandably chaotic ..." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984). The only "procedural protection" offered to avoid erroneous detention is the on-the-spot decision by an INS officer

that someone is working without the right to do so.

The Government's interest in a blanket approach to detention and bond, meanwhile, is *de minimus*. The vast majority of arrested persons—over 97.5 percent—"voluntarily depart" without ever seeking release on bond. *INS v. Lopez-Mendoza*, 468 U.S. at 1044. For those few individuals who do seek release, there could hardly be any greater administrative burden in determining whether a no-work condition is warranted in an individual case than there is in detaining that individual for months on end. In any event, the uncontested evidence indicates that INS's regulation would have no measurable impact on job opportunities for United States workers.

ARGUMENT

I. SECTION 242 DOES NOT AUTHORIZE A REGULATION WHICH IMPOSES A BLANKET CONDITION BARRING EMPLOYMENT IN RELEASE BONDS

The "'starting point [of this inquiry] is the language of the statute . . .'" *Dole v. United States Steelworkers of America*, 110 S.Ct. 929, 934 (1990) (*quoting Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985)). Section 242 is entitled and concerns the "[a]pprehension and deportation of aliens." Subsection (a) is entitled and concerns the "[a]rrest and custody" of persons.

1. All available authority indicates that the "conditions" the Attorney General may impose under § 242 must be individualized and reasonably related to the person's availability for proceedings, the national security or public safety. The discretion granted in § 242(a) must be reasonably exercised upon a consideration of individual factors. *Carlson v. Landon*, 342 U.S. 524. 538 (1952). INS asserts its discretion in setting bond conditions is "untrammeled." Pet. Bf. at 20. However, based upon a review of the history of

section 23, Internal Security Act of 1950, Pub.L. 81-831, § 23, ch. 1024, 64 Stat. 987, 1010-12 (1950), *reprinted in* 1950 U.S. Code Cong. & Ad. News. 984, 1005-07, the precursor of § 242(a), this Court has already rejected this claim:

> [T]he Attorney General is not left with untrammeled discretion as to bail. * * * [He] must justify his refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity. * * * This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards.

Carlson v. Landon, 342 U.S. at 543-44 (emphasis added). The Court further made clear that:

> [P]urpose to injure [through Communist activities] could not be imputed generally to all aliens subject to deportation [for Communist activity]. * * * [E]vidence of membership plus personal activity in supporting and extending the [Communist] Party's philosophy concerning violence gives adequate ground for detention * * * There is no evidence or contention that all persons arrested under § 22 of the Internal Security Act, for Communist membership are denied bail.

Carlson v. Landon, 342 U.S. at 538, 541-42 (emphasis added). In *United States v. Witkovich*, 353 U.S. 194 (1957), this Court reviewed the scope of § 242(d), concerning conditions of release for aliens against whom orders of deportation were outstanding for six months. The Court held:

> [O]nce the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words [of § 242(d)] become operative ... The preoccupation with the entire subsection . . . is certainly with availability for deportation ... [It is therefore] an appropriate construction to limit the

> statute to ... all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens.

Id. at 199-202 (emphasis added). The INS could hardly enjoy greater power over persons not proved deportable than over aliens already ordered deported.

All cases decided prior to the enactment of § 242(a) make clear that bond decisions must be individualized and relate to the same purposes expressed in *Carlson*.[5] When Congress enacts a new law that incorporates language of a pre-existing law, it is presumed to have knowledge of prior judicial interpretations and to have adopted those interpretations for the purposes of the new law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382, n. 66 (1982).

For the first thirty years following enactment of § 242(a) the Attorney General appeared to recognize and agree with these judicial interpretations. In *Toscano-Rivas*, he was called upon to review a Board of Immigration Appeals (BIA) decision involving a bond condition barring unauthorized employment issued pursuant to 8 C.F.R. § 103.6(a)(2).[6] 14 I&N Dec. at

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5 *See, e.g., United States ex rel. Pirinsky v. Shaughnessy*, 177 F.2d 708, 709 (2d Cir. 1949); *United States ex rel. Potash v. District Director*, 169 F.2d 747 (2d Cir. 1948); *United States ex rel. Zapp v. District Director*, 120 F.2d 762 (2d Cir. 1941); *United States ex rel. Burleigh v. Shaughnessy*, 100 F.Supp. 993, 994 (S.D.N.Y. 1951); *Podolski v. Baird*, 94 F.Supp. 294, 299 (E.D. Mich. 1950); *United States ex rel. Klig v. Shaughnessy*, 94 F.Supp. 157, 160 (S.D.N.Y. 1950); *Ex parte Sentner*, 94 F.Supp. 77, 82 (E.D. Mo. 1950).

6 The BIA is delegated authority by the Attorney General over a wide range of appellate matters involving decisions of immigration judges and INS officials. *See generally* 8 C.F.R. § 3.1(b). After reversing the imposition of the "no work" bond condition in *Toscano-Rivas*, the BIA referred the case to the Attorney General for review of its decision pursuant to 8 C.F.R. § 3.1(h)(ii).

550. INS argued that imposition of the bond condition was justified only by the "peculiar factual situation presented in the case[]," 14 I&N Dec. at 528, including that the apprehended persons were "concededly deportable [and therefore had] no legal right to remain" in the country, and their illegal employment was shown to "deprive American workers of employment ..." *Id.* at 528. The INS "assure[d] [the BIA] that [it did] not intend to use the 'no unauthorized employment' condition indiscriminately in the cases of all aliens here illegally, but only on a carefully selective basis." *Id.* at 528. The Attorney General concluded the bond restriction would be appropriate only "in some circumstances ...":

> For example, there may be cases in which an alien's past employment would have a direct bearing upon his availability for hearings or deportation or upon national security. * * * [I]n some circumstances, a bond condition prohibiting unauthorized employment [would be proper].

Id. 553, 556. INS now seeks to indiscriminately impose a "no work" bond rider in all situations.[7]

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7 INS's claim that the "no work" regulation "is based on a long-standing statutory interpretation that merits great deference" is ludicrous. Pet. Bf. 11. As the Attorney General stated in *Toscano-Rivas* in 1974, twenty-two (22) years after the enactment of section 242(a), "no such condition had ever [before] been included in a bond used in connection with deportation proceedings." 14 I&N Dec. at 550. Shortly thereafter the INS promulgated a regulation which authorized imposition of an employment condition in bonds in individual cases, did not require a "compelling" showing to obtain employment authorization and remove the bond condition, and did not require custody without bond for employment believed to be unauthorized. A single abrupt effort at promulgating regulations--more than thirty (30) years after enactment of the purported authorizing statute--does not constitute a

2. In 1952 Congress did not make unauthorized employment illegal. Under the Act, provisions relating to relief from deportation and the granting of visas remain completely available regardless of prior "unauthorized employment." It is unlikely that Congress at the same time intended to grant broad authority to detain indefinitely solely based upon the INS's perception employment is unauthorized.

As recently as 1984, this Court pointed out that "[t]he INA [of 1952] evinces 'at best evidence of a *peripheral concern with employment of illegal entrants.*'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (emphasis added) (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)). An explicit proviso explained that "employment ... shall not be deemed to constitute harboring" under 8 U.S.C. § 1324(a)(3). H.R. Rep. No. 1365, 82d. Cong., 2d Sess, *reprinted in* 1952 U.S. Code Cong. & Ad. News at 1724. "The employment relationship between an employer and an undocumented alien is hence not illegal under the INA . . ." *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 893.

Furthermore, in 1952 Congress did not make obtaining visas or relief from deportation dependent on the absence of prior unauthorized employment. "Suspension of Deportation" remained available to aliens regardless of prior "unauthorized employment." 8 U.S.C. § 1254. "Adjustment of Status," 8 U.S.C. § 1255, a provision permitting certain aliens to obtain resident status without departing the country for the normal interview at a United States consulate, contained no limitation on eligibility for prior "unauthorized employment." 8 U.S.C. 1255(a).[8] It

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consistent interpretation of the statute entitled to any significant deference by this Court.

[8] The INS points out that in 1976 Congress provided, "with limited exceptions," that "aliens could not become permanent residents if they accepted unauthorized employment before filing their applications . . ." Pet. Bf. at 29 (citing Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706). First, this limitation was enacted in 1976, twenty-four years after enactment of § 242(a). Second, the 1976 amendment did not provide that "aliens could not become permanent residents" if they engaged in prior unauthorized employment. They could become residents by obtaining their visas abroad. Third, the 1976 amendment does not effect the ability of the majority of applicants, those aliens with U.S. citizen immediate family members, from obtaining "adjustment of status" regardless of prior unauthorized employment. 8 U.S.C. § 1255(c).

would be illogical to assume that while Congress explicitly allowed aliens to remain in the country and process applications for lawful status despite prior "unauthorized employment," it implicitly intended that they be detained for such conduct.

The INS cites 8 U.S.C. § 1182(a)(14) for the position that "unauthorized employment violates the INA." Pet. Bf. 11. Section 1182(a)(14) only bars the admission of certain aliens unless the Department of Labor "has determined and certified" that there are "not sufficient workers in the country who are able, willing [and] qualified" to perform the services the alien seeks to perform. 8 U.S.C. § 1182(a)(14). In fact, an applicant for admission may qualify under § 1182(a)(14) regardless of prior unauthorized employment. Furthermore, § 1182(a)(14) by its terms does not apply to family-based immigrants, about 80 percent of all immigrants. *Id. See* Opp. Cert. Bf. 2, n. 2.

In 1952 Congress did not amend the statute permitting persons, regardless of status, to obtain Social Security card for employment in the United States. 42 U.S.C. § 405(c)(2)(B) (added by Act of Oct. 30, 1972, Pub. L. 92-603, Title I, § 137, 86 Stat. 1364).

Finally, in IRCA Congress provided for adjustment of status (amnesty) for aliens who had "continuous unlawful residence since [January 1,] 1982." 8 U.S.C. § 1255a(a)(2)(A). Prior unauthorized employment is not a bar to such adjustment of status. In fact,

applicants are required to "demonstrate[] a history of employment" in the United States. 8 U.S.C. § 1255a(d)(2)(B)(iii). Since the applicant must have "unlawful residence since 1982," 8 U.S.C. § 1255a(a)(2)(A), the "employment" required to qualify would always be unauthorized.

In expounding a statute, the judiciary is not guided by a single section, but "'look[s] at the ... whole law and to its object and policy.'" *Dole v. United States Steelworkers of America*, 110 S.Ct. 929, 934 (1990), (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). As we have demonstrated, examination of the "whole law" of 1952 shows that Congress neither made "unauthorized employment" a crime nor a deportable offense nor a bar to qualifying for a visa or relief from deportation. Indeed, looking at the 1952 statute "as a whole," it is clear that Congress did not penalize past "unauthorized employment." It is illogical to assume it nevertheless intended implicitly to grant the INS the power to detain for such activity.

3. The INS claims authority to detain whenever detention is "designed to serve any of the policies of the Immigration and Nationality Act." Pet. Bf. 14. A policy of the INA is to deport aliens "who at the time of entry" were "within one or more of the classes of aliens excludable" at the time of entry. 8 U.S.C. § 1251(a)(1).[9] Similarly, it is a policy of the INA to deport certain aliens because of their conduct and

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9 Classes of excludable aliens include, *inter alia*, those who are "mentally retarded," 8 U.S.C. § 1182(a)(1), those who are homosexuals, 8 U.S.C. § 1182(a)(4) ("psychopathic personality"), those who are "paupers • • • or vagrants," 8 U.S.C. § 1182(a)(8), those "likely to become public charges," 8 U.S.C. § 1182(a)(15), and those "over sixteen years of age • • • who cannot read and understand some language or dialect." 8 U.S.C. § 1182(a)(25).

status. 8 U.S.C. § 1251(a)(1)-(28)(1952).[10] Under INS's interpretation of § 242, it would have the authority to jail without bond all persons awaiting deportation hearings if they are suspected of engaging in the conduct or maintaining the status giving rise to their proceedings in the first place. Such a result is contrary to the policy choice that Congress made in the INA: to deport such aliens only if the INS can meet its burden of proof, but not to imprison them prior to that determination.

4. The 1952 Act provides that in a deportation hearing the INS, not the suspected deportable alien, bears the burden of proof. Section 242(b)(4) provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." 8 U.S.C. § 1252 (b)(4); *Woodby v. INS*, 385 U.S. 276, 488 (1966). If the INS fails to meet its burden, the deportation proceeding is terminated. *See, e.g., Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984). As this Court has recognized, "[t]here is no assurance that a [person] subject to deportation [proceedings] will ever be deported." *Plyler v. Doe*, 457 U.S. 202, 206 (1982).[11]

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10 For example, those who, *inter alia*, "within five years after entry, becomes institutionalized at public expense," 8 U.S.C. § 1251(a)(3), "within five years after entry become[s] a public charge," 8 U.S.C. § 1251(a)(8), or "fail[s] to maintain the nonimmigrant status in which he was admitted," 8 U.S.C. § 1251(a)(9).

11 *See, e.g., Whetstone v. INS*, 561 F.2d 1303 (9th Cir. 1977) (deportation reversed, respondent entitled to permanent resident alien status); *C.M.K. v. Richardson*, 371 F.Supp. 183 (E.D. Mich. 1974) (deportation order reversed, respondent a "derivative citizen of the United States"); *Liacakos v. Kennedy*, 195 F.Supp. 630 (D.D.C. 1961) (deportation order set aside, respondent a "natural born citizen of the United States"); *Matter of Battista*, Interim Decision 3036 (BIA 1987) (respondent arrested and placed in deportation proceedings in 1983; BIA

Contrary to the statutory burden of proof, the challenged regulation presumes that plaintiffs are deportable aliens and therefore can be prohibited from working. This presumption is carried forward into INS's brief, which erroneously calls plaintiffs "aliens who enter[ed] the United States illegally, and who are [therefore] not authorized to work . . ." Pet. Bf. 5. At one point INS concedes who is really impacted by its regulation: "person[s] charged with immigration violation[s] . . ." Pet. Bf. 15, n. 7. Until the INS meets its burden of proof in the hearing, plaintiffs are entitled to the statutory presumption that they are simply "person[s] charged" with immigration violations.[12]

5. Further indicating that Congress did not intend to delegate the broad scope of authority now assumed by the INS under § 242(a), is the language in § 242(c):

> When a final order of deportation * * * is made against any alien * * * the alien may *** be released on bond *** or released on such other conditions as the Attorney General may prescribe.

8 U.S.C. § 1252(c) (emphasis added).

Section 242(d) provides that as to any alien against

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reverses deportation order four years later); *Matter of Naulu*, Interim Decision 3005 (BIA 1986) (found deportable by immigration judge in 1983; reversed by BIA three years later).

12 Further, the employment authorization form which plaintiffs must complete to terminate the "no work" bond rider requires the applicant to list his place of birth, country of nationality, and date, place and manner of entry into the United States. *See* INS Form I-765, Application for Employment Authorization. These forms are used to meet INS's burden of proof in the deportation hearing. 8 C.F.R. § 242.14. Therefore, INS's challenged regulation, which requires arrested persons to apply for employment authorization to remove the "no work" rider, completely vitiates the burden of proof which statutorily falls on the agency.

whom a final order of deportation has been outstanding for more than six months, such alien shall be subject to supervision by the Attorney General, "includ[ing] ... reasonable written restrictions on his conduct ..." INA § 242(d) (emphasis added).

These sections indicate that Congress intended the Attorney General to have more limited authority under § 242(a) regarding the detention of persons not yet found deportable. Section 242(a) only permits the inclusion of "conditions" in a bond, while sections 242(c) and (d) permit the imposition of "conditions" unrelated to the bond. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

II. THE LEGISLATIVE HISTORY OF SECTION 242 ESTABLISHES THAT THE CHALLENGED REGULATION WAS NEVER INTENDED BY CONGRESS

Legislative intent must primarily, if not exclusively, be judged as of the time of the statute's enactment. *United States v. Wise*, 370 U.S. 405, 411 (1962). *See also United States v. Clark*, 445 U.S. 23, 33 n.9 (1980). INS's repeated reliance on post-1952 legislative statements--*e.g.*, Pet. Bf. 18, 29, 30, 31, 32, 40--should be given little weight.

A. The Immigration Act of 1917

Section 242(a) originated as Chap. 29, § 20 of the Immigration Act of 1917, which granted authority to release individuals on bond pending a deportation hearing. Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 890-91 (1917). Section 20 provided that pending the final disposal of the case of any alien taken into custody, "he may be released under bond . . . conditioned that such alien shall be produced when required for a hearing ..." Act of Feb. 5, 1917, ch. 29, § 20, 39 Stat. 874, 891 (1917). The statute was clearly concerned with appearance for proceedings.

B. The Language and History of H.R. 10

1. H.R. 10 Was Not Intended to Cause Detention Without Bond for Persons Awaiting the Outcome of Deportation Proceedings

Early versions of H.R. 10 would have permitted detention without bond for several classes of criminal and subversive aliens found deportable, as well as aliens found deportable "regardless of the charge ... who entered the United States within ten years preceding the issuance of the warrant of arrest ..." H.R.Rep. 1192, 81st Cong., 1st Sess. 3 (1949). However, by 1950 the House bill eliminated the language authorizing detention of aliens found deportable who entered within ten years preceding the issuance of a warrant of arrest, and limited detention without bond to criminal and subversive aliens. 96 Cong. Rec. 10449 (1950). The bill reported by the Senate Judiciary Committee in July 1950 eliminated entirely the proposal authorizing detention without bond for aliens found deportable, requiring instead that such aliens be convicted of "felonies" for failing to depart the United States. S. Rep. No. 2239, 81st Cong. 2d Sess. at 3. Clearly these developments manifest a withdrawal of the intended scope of the

Attorney General's proposed authority to detain.

Representative Hobbs, the author of H.R. 10, was absolutely clear that he did not intend the proposed legislation to result in detention for persons, like plaintiffs, charged in deportation proceedings, but rather only for "those that have been finally ordered [deported]." 96 Cong. Rec. 10674 (1950).[13] "It is not the deportable aliens; it is those that have been ordered finally deported" that H.R. 10 was meant to authorize the Attorney General to detain. *Id.* at 10675. *See also* 96 Cong. Rec. 10449 (1950) (remarks of Rep. Walter, who introduced the bill). H.R. 10 was not intended to result in the detention of plaintiffs who have not been "ordered finally deported."

2. H.R. 10 Was Intended to Permit Detention "In Aid of Deportation," Not In Aid Of Every Other Purpose The Act Intends to Achieve

It is also clear from the legislative history of H.R. 10 that detention was viewed as a mechanism to effect deportation, not as a mechanism to allow the Attorney General to further other broad purposes of immigration policy. The bill's author stated on the first day of debate that the "one single purpose" of granting the Attorney General additional detention powers in the bill was the "restoration of the sovereign power of our Government to deport criminal aliens ..." 96 Cong. Rec. 10456 (1950). The first sentence of the House Report states that the bill was intended "to facilitate the deportation of aliens ..." H.R. Rep. 1192 at 1.[14]

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13 The broad new detention power of the Attorney general was meant to come into "effect" only "after the warrant of deportation, which is the final step after all the courts have spoken . . . [and the alien has] exhaust[ed] all of his remedies . . ." 96 Cong. Rec. at 10674-75.

14 Through detention, it was believed, aliens found deportable would be encouraged to locate countries that would accept them. 96 Cong. Rec. 10453 (1950) (remarks of Representative Keating).

Under H.R. 10 certain aliens were to be "detained in aid of deportation ..." 96 Cong.Rec. 10677 (1950) (comments of Rep. Hobbs). INS's challenged regulation is clearly not "in aid of deportation," nor is it necessary "to facilitate the deportation of aliens ..."

Finally, INS draws support for its regulation from language in the House and Senate Reports accompanying H.R. 10 which state that the bill intended that the Attorney General shall have "untrammeled authority" to impose such conditions "as he sees fit in releasing an alien under bond." Pet. Bf. at 19-20 (*quoting* H.R. Rep. 1192, 81st Cong. 1st Sess. at 6 (1949) and S. Rep. No. 2239, 81st Cong., 2d Sess. at 5 (1950)). First, as we have already discussed, H.R. 10 was never enacted--for over ten years the Senate refused to even vote on the bill. The primary opposition to H.R. 10 related precisely to the increased detention powers it offered the Attorney General.[15] It is therefore unclear how the INS's analysis is aided by the statement of "untrammeled authority" in the legislative history of H.R. 10. Second, in *Carlson*, in response to the same argument--in fact citation to the same passages in the H.R. 10 reports--this Court stated that "[t]he Attorney General is not left with untrammeled discretion as to bail." *Carlson v. Landon*, 342 U.S. at 543 (emphasis added). Third, the author of H.R. 10 repeatedly stated that his bill was intended to result in detention without bond of certain classes

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15 *See, e.g.* H.R. Rep. No. 1192, 81st Cong., 1st Sess. 17-18 (1950) (minority views of Rep. Emanuel Celler and Rep. Martin Gorski) ("fifth edition of the same bill" would allow overbroad detention of "the good and decent" along with "crooks and subversives"); 96 Cong. Rec. at 10451 (1950) (remarks of Rep. Celler) ("We know that power corrupts, and absolute power corrupts absolutely. We give absolute power here."); 96 Cong. Rec. at 10454 (1950) (remarks of Rep. Marcantonio) (Congress had H.R. 10 before it "for the past 10 years"; Senate refused to consider "violent assault upon the Constitution of the United States").

of aliens found deportable, not aliens arrested and charged with being deportable. The regulation in this case goes far beyond any authority Representative Hobbs intended to grant in H.R. 10.

C. The Language and History of Section 23 of the Act of 1950 Reject Rather Than Support Detention For Unauthorized Employment

In 1950, Congress amended section 20 of the 1917 Act through passage of the Subversive Activities Control Act (SACA), enacted as Title I of the Internal Security Act of 1950. Internal Security Act of 1950, Pub.L. 81-831, § 23, ch. 1024, 64 Stat. 987, 1010-12 (1950), *reprinted in* 1950 U.S. Code Cong. & Ad. News 984, 1005-07. This Act's purpose was to "deport all alien Communists as a menace to the security of the United States . . ." *Carlson*, 342 U.S. at 541. A further purpose was to resolve a conflict between the Circuits regarding whether the Attorney General had "discretion" to detain certain aliens or whether release was a matter of right. *Carlson v. Landon*, 342 U.S. at 538-540. The Sixth Circuit construed the Immigration Act of 1917 to obligate the Attorney General to grant bail. *Prentis v. Manoogian*, 16 F.2d 422 (6th Cir. 1926). The Second Circuit construed the Act as granting discretion to grant bail. *United States ex rel. Potash v. District Director*, 169 F.2d 747 (2d Cir. 1948), and *United States ex rel. Zapp v. District Director*, 120 F.2d 762 (2d Cir. 1941). In the 1950 Act, Congress adopted the construction of the Second Circuit. *Carlson v. Landon*, 342 U.S. at 539-540.

Congress's adoption of the Second Circuit's view does not support the "untrammeled" discretion which the INS now asserts. The Second Circuit's position was stated in *Potash v. District Director*:

> The discretion of the Attorney General ... is interpreted as one which is to be reasonably exercised upon a consideration of such factors,

among others, as the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail.

169 F.2d at 751 (emphasis added). As all courts and the BIA had previously and have since held, bond matters were individualized and custody without bail was limited to considerations of appearance, and danger to the public safety and national security. *United States ex rel. Pirinsky v. Shaughnessy*, 177 F.2d 708, 709 (2d Cir. 1949) ("the issue in each case must be individual"); *United States ex rel. Burleigh v. Shaughnessy*, 100 F.Supp. 993, 994 (S.D.N.Y. 1951); *United States ex rel. Klig v. Shaughnessy*, 94 F.Supp. 157, 160 (S.D.N.Y. 1950); *Podolski v. Baird*, 94 F.Supp. 294, 299 (E.D. Mich. 1950).

Of particular importance to this inquiry is section 23 of SACA, since § 242(a) "in general, follows the procedure established by section 23 of [SACA]." *See* H.R. Rep. No. 1365, *reprinted in* 1952 U.S.Code Cong. & Ad. News at 1711. Section 23 states:

> Pending final determination of the deportability of any alien taken into custody . . . such alien may, in the discretion of the Attorney General ... be released under bond ... with security approved by the Attorney General ... It shall be among the condition of any such bond ... that the alien be produced, or will produce himself, when required to do so ...

SACA § 23, *reprinted in* 1950 U.S.Code Cong. & Ad. News 984, 1006. The language of the statute clearly focuses on bond as a mechanism to insure availability. The conference report states that the purpose of the section was to provide "control over, and facilitate the deportation of, deportable aliens." H.R.Conf.Rep. No. 3112, 81st Cong., 2d Sess., *reprinted in* 1950 U.S.

Code Cong. & Ad. News 3886, 3899, 3911. While *Carlson* interpreted section 23 of SACA to include the authority, in individual cases, to impose conditions of bond relating to the national security, it held the Attorney General's authority was approved only "within the framework of the ... Act to guard against Communist activities ..." *Carlson*, 342 U.S. at 544. The "framework" of the 1950 Subversive Activities Control Act clearly addressed Communist activities as a major threat to the very survival of this nation: "[T]he Communist movement in the United States . . . [seeks the] overthrow of the Government ... by force and violence ... [It presents] a clear and present danger to the security of the United States ..." 50 U.S.C. § 781(15).

Neither the 1950 nor the 1952 Acts address unauthorized employment of aliens in terms comparable to the grave concerns expressed by Congress regarding the subversive threat. While Congress made Communists excludable and deportable, Internal Security Act, Title I, § 2, it did not make prior unauthorized employment a bar to obtaining a visa or relief from deportation. Nothing in section 23 of SACA remotely suggests an intent to grant the Attorney General the authority to impose a blanket condition in bonds barring employment, to require a showing of a "compelling" need to work in order to remove such a condition, or to detain without bond persons believed to be working without authorization.

D. The Legislative History of the INA of 1952

If Congress intended any major changes in the detention power of the Attorney General in the 1952 law, it failed to say so. The House Report states that "[t]his provision, in general, follows the procedure established in section 23 of the Subversive Activities Control Act of 1950." H.R.Rep. No. 1365 at 1711. The report states that pending deportation proceedings the apprehended person may be "continued in

custody, released on bond or released on conditional parole." *Id.* at 1711-12. There is no mention of any authority to place blanket "conditions" in bonds which the Attorney General believes will further the "broad" policies of the Act. There is no indication that people facing deportation could be detained for allegedly working without authorization.

Regarding protection for American workers, the authoritative House Report states:

> It is the opinion of the committee that this provision [section 212(a)(14) which requires that some aliens possess labor certificates prior to obtaining visas] will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor ...

H.R.Rep. 1365 at 1705 (emphasis added).[16]

In the name of further protecting American workers, the challenged regulation permits detention without bond based upon the belief of a local INS official that a person in proceedings--but not yet found deportable--is working without the right to do so. Absolutely nothing in the language or legislative history of section 242 ot the INA of 1952 suggests that Congress intended to grant the Attorney General the sweeping authority to adopt such a regulation.

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16 INS quotes this same passage for the position that it has been "Congress's consistent policy" to protect American labor through the immigration laws. Pet. Bf. 27. The INS however conveniently deletes from its quote that part of the sentence which states that section 212(a)(14) "will adequately" protect that policy.

E. The Legislative History of INA Section 103 Does Not Support INS's Policy-Making in the Area of Detention

The legislative history of INA § 103 affords little help to the INS. Under that provision, according to the authoritative House Report, Congress intended only that the Attorney General be "charged with primary responsibility for the administration and enforcement of the provisions of the bill ..." H.R.Rep. No. 1365 at 1687 (emphasis added). In terms of the issuance of regulations, Congress only intended the INS to "issue such regulations as may be necessary for performing their functions under the provisions of the bill." *Id.*. Authority is limited by "the provisions of the bill." While section 103 may grant the Attorney General the authority to further immigration policy through agency regulations, that authority does not extend to the promulgation of regulations impermissible under the law he is delegated to enforce.

F. Enactment of IRCA Further Establishes the Impropriety of the Challenged Regulation's Penalty for Alleged Unauthorized Employment

While recognizing that later enactments do not explain what Congress had in mind in 1952, we nevertheless set forth below some aspects in which the challenge regulation conflicts with implementation of IRCA. We do so in light of this Court's earlier order remanding for reconsideration in light of IRCA. 481 U.S. 1009, 1009-1010 (1987).

1. IRCA Clearly Distinguishes Threats to National Security From Employment Concerns And Gives The Former Far Greater Importance

One issue present throughout this litigation has been whether because detention is authorized to protect against the activities of Communist subversives it is also authorized to protect against unauthorized employment. IRCA does nothing to aid INS's position

in this regard. Under § 201(a) of IRCA, national security grounds remain non-waivable grounds for denying legalization. 8 U.S.C. § 1255a(d)(2)(B)(ii)(IV). In contrast, IRCA renders inapplicable (not merely waiv-able at the Attorney General's discretion) the grounds for exclusion which govern aliens entering the United States to work without authorization. 8 U.S.C. § 1255a(d)(2)(A); 8 U.S.C. § 1182(a)(14). In fact, under IRCA's amnesty provision applicants are required to "demonstrate[] a history of employment" in the United States. 8 U.S.C. § 1255a(d)(2)(B)(iii). Since, by definition, the applicant must have "continuous unlawful residence since 1982," 8 U.S.C. § 1255a(a)(2)(A), the "employment" required to qualify would, in every case, have been unauthorized. Were there no injunction in this case, thousands of amnesty eligible aliens would have been disqualified because of their inability to "demonstrate[] a history of employment." The structure of the grounds of exclusion and provisions regarding amnesty show that Congress did not consider unauthorized employment the sort of danger to the nation posed by subversives or those threatening the national security.

2. IRCA's Approach to Unauthorized Employment

Title I of IRCA adds 8 U.S.C. § 1324a, which, for the first time, penalizes *employers* who knowingly hire undocumented aliens.[17] Beginning in 1971, the House Judiciary Committee, under the chairmanship of Rep. Peter W. Rodino, Jr., later to become the primary author of IRCA in the House, held extensive hearings on alien employment controls. During these hearing James L. Hennessey, Executive Assistant to the Commissioner of the INS, testified on controlling

17 Employers who violate these restrictions are subject to cease and desist orders and civil fines. 8 U.S.C. § 1324a(e)(4). Contumacious violators are subject to criminal prosecution and injunctions. 8 U.S.C. § 1324a(f).

accused aliens' employment:

> RODINO. [During deportation proceedings] the fact that an illegal alien is a holder of a job or some employment, means that there is no such surveillance on the part of the Service or anybody that he won't be holding the job?
>
> HENNESSEY. He will undoubtedly continue. In fact, having still the right to go before the Board [of Immigration Appeals], I don't think we could attempt or ask for any legislation that he not hold the job. We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him.

1971 Hearings at 46. *See also* Decision of the Court of Appeals, Pet. App. at 43a-44a (regarding similar testimony by other INS officials). The Committee concluded "[t]he illegal entrant should not be subject to additional penalties . . ." *Id.*[18] In floor debates Representative Rodino summarized that "[a]dditional penalties [against immigrant workers] would serve no useful purpose . . ." 118 Cong. Rec. 30155 (1972). Controlling employment exclusively through sanctions against *employers* would remain the approach of all

18 Mr. Rodino expressed his personal opposition to employee sanctions as follows:

> To impose more penalties on illegal entrants in the opinion of the member, would not only be futile but unwarranted.
>
> I recognize the the illegal alien is one who is not the criminal type. He is seeking to find an opportunity, and I think that we have got to act in a humanitarian manner.

1971 Hearings, pt. 4 at 1168-69.

succeeding bills,[19] eventually to be adopted in the IRCA itself.

While IRCA seeks to discourage unauthorized employment through penalties on employers, it clearly does not do so by penalizing aliens with detention. In the months leading up to the passage of the IRCA, Congress specifically rejected detention of employees as a control on unauthorized entry and employment. A witness before the Senate Immigration Subcommittee, research scholar Dr. Barry Chiswick, proposed "detention of the illegal worker" -- rather than employer penalties -- as the vehicle to deter unauthorized employment. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy*, 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 44-45. Dr. Chiswick offered that such penalties "offer a better hope than ... employer sanctions." *Id.* at 45.

Senator Simpson, Chairman of the Committee and primary author of IRCA, scored Mr. Chiswick's approach as being "politically harsh, ... [and] unrealistic ..." *Id.* at 56. Senator Simpson stated that although it "pointed out that there are some very fascinating ways to present to the subcommittee what we should do about illegal immigration ... it was my thought ... we ought to try the most humane one [i.e. employer sanctions] first ... [I]f we do not get that done, then we will go on to other methods ... [which today] are expressed out of frustration ..." *Id.*

In reporting the IRCA to Congress the House Judiciary Committee declared itself "convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens." H.R. Rep. No. 99-682(I), 99th Cong. 2d Sess., at 46 *reprinted in*

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19 For a history of the successive bills, see H.R. Rep. No. 99-682(I) at 51-55, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5649, 5655-60.

1986 U.S. Code Cong. & Ad. News 5649, 5650. The Attorney General concurred, advising the Congress that only through "employer sanctions" can the "entry of illegal aliens into jobs" in the United States "be addressed effectively." Id. at 105.

3. IRCA's "Grandfather" Provision

Further of interest to this Court's earlier remand in light of the enactment of IRCA are the statutory exemptions to employer sanctions allowed by Congress. Formulating what it considered to be a balanced approach to the issue, Congress provided that aliens without work authorization hired at the time of or before the enactment of the IRCA may continue to be employed without penalty on the employer. H. Rep. 99-603(I) at 56; 8 C.F.R. § 274a.7. While IRCA exempts hundreds of thousands of these "grandfathered" workers from the impact of employer sanctions, INS's regulation makes no exemption for them.

Even a casual reading of INS's regulations reveals an attempt to regulate employment specifically left unregulated by Congress. Though the INS may remain "frustrated" over Congress' failure to enact employee sanctions, Senator Simpson, with the full support of President Reagan and both Houses of Congress, flatly rejected jailing alien workers as a means to control their employment. Instead, Congress determined that employer sanctions coupled with improved border enforcement "is the only effective way to reduce illegal entry ... [and] is the most practical and cost-effective way to address this complex problem." H.R. Rep. No. 99-682(I) at 49 (emphasis added).[20] Four adminis-

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20 The House Judiciary Report accompanying HR 3801 states, "This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal

trations and the Select Commission on Immigration and Refugee Policy have recognized the logic of this approach. H. Rep. No. 99-603(I), at 46.

In summary, because the statute as a whole, considered with its legislative history, expresses the intention of Congress to detain on an individualized basis in matters only relating to appearance, availability for deportation and the national security and public safety, this Court should decline to defer to INS's flawed interpretation. *See Dole v. United States Steelworkers of America*, 494 U.S. 26, 110 S.Ct. 929, 938 (1990); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter"). The discussion above has shown that the INS's "detention for alleged un-authorized employment" regulation "is not based on a permissible construction of the statute." *Id.*, at 842-843 (footnotes omitted). The regulation is neither "rational [nor] consistent with the statute." *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987). Neither Congress nor this Court has sanctioned the "'unauthorized assumption by an agency of major policy decisions.'" *Adams Fruit Company, Inv. v. Barrett*, ___ U.S. ___, 110 S.Ct. 1384, 1391 (1990) (*quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (*quoting in turn American Ship Building Co., v. NLRB*, 380 U.S. 300, 318 (1965))).

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immigration, is through employer sanctions." H.R. Rep. 99-682(I), at 46. Congressman Fish, ranking minority member of the House Judiciary Committee, explained that employer sanctions "is the only effective option available" for immigration reform. 132 Cong. Rec. at H9711 (1986).

III. APPROVAL OF THE CHALLENGED REGULATION WOULD RAISE SERIOUS QUESTIONS REGARDING THE CONSTITUTIONALITY OF INA SECTION 242(A)[21]

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score . . ." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). *Accord Public Citizen v. Department of Justice*, ___ U.S. ___, 109 S.Ct. 2558, 2566 (1989). In construing a statute that could impair important constitutional rights, this Court has placed special emphasis on this axiom of statutory construction, holding that there must be an "'affirmative intention of the Congress clearly expressed'" that such is the legislature's intent. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979) (emphasis added) (freedom of religion).

This Court should surely pause before imputing congressional intent to regulate employment at the expense of the personal liberty of an entire class of persons; rather it should construe congressional intent underlying the Immigration Act as embracing constitutional values and as being in harmony with this nation's historic respect for the bodily freedom of all but those individuals shown to have abused that

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21 Plaintiffs' complaint includes claims based on Fifth Amendment due process and equal protection. J.A. at 43-44. Complete adjudication of these claims would require an evidentiary hearing on, *inter alia*, the reasonableness of the INS's asserted interests, the extent and nature of harm caused to plaintiffs by the challenged regulation, the risk of erroneous deprivation and the likelihood that additional safeguards would prevent such deprivation. The discussion above and following is only meant to show that INS's interpretation of section 242(a) raises serious constitutional questions.

freedom following a due process hearing.

For purposes of this analysis it matters little whether the condition is defined as barring "employment" or "unauthorized employment." The INS, as stated repeatedly in its brief, considers plaintiffs and their class members to be illegal aliens not authorized to work. Pet. Bf. 5 ("aliens who enter the United States illegally, and who are [therefore] not authorized to work"); *id.* at 6 ("burden [of the regulation falls] on these aliens"); *id.* at 35 (class members are "arrested aliens whose status does not confer work authorization"). When the person contesting deportability considers himself authorized to work, and does so following release without first applying for and receiving employment authorization from the INS, functionally it matters not whether the one considers the regulation to bar "unauthorized" employment or all employment. Under these circumstances INS considers all employment to be unauthorized; and all employment following release without first obtaining permission from the INS a basis for detention without bond.

A. INS's Imposition of Jail Without a Hearing Violates Plaintiff's Procedural Due Process Rights

Heretofore, this Court has approved prolonged detention without trial only upon a prior individualized finding in a due process hearing that there are good and sufficient grounds to detain. *E.g., United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court set out the following test by which to determine what process is due:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. Application of the *Mathews* formulation to the regulation at issue demonstrates that grave doubts about the constitutionality of § 242(a) would be the inevitable consequence of interpreting the statute as authorizing the indiscriminate prohibiting of employment for persons facing deportation proceedings and their jailing without bail for suspected violation of the prohibition, all accompanied with no due process hearing.

1. The right to bodily freedom is of unsurpassed importance.

Determining what process is due first involves assessing the importance of the private interest at stake. Here the INS has made it abundantly clear that the penalty for violating its work restrictions is re-arrest and incarceration until deportation proceedings are completed. Pet. App. 141 ("[w]here the 'no work' condition is violated, the appropriate response would be to take the alien into custody").[22] An individual

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22 In fact, the unrebutted evidence further established that the mere imposition of the "no work" rider in the bond would prevent many people from obtaining release following arrest as most bond companies will refuse to underwrite securities under such circumstances. Pet. App. at 15a, n. 7. That the challenged regulation would result in a "substantially larger number" of people being detained pending the outcome of deportation proceedings was deemed an "acceptable consequence" by the agency. *Id.* at 15a and 17a, n. 7.

committed to INS jails through operation of this no-work condition is obviously deprived of bodily liberty.

In the hierarchy of constitutional rights, bodily liberty is second only to life itself. "Inviability of the physical person is universally put first among the demands made by the individual." 3 Pound, *Jurisprudence* 33 (1959). As this Court has held,

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

The first element of the *Mathews* balancing test, therefore, tips decidedly in favor of requiring at least some procedural protection before the extended restraint on liberty occasioned by the INS's challenged regulation.

2. Blanket imposition of a condition of release creates an unacceptable risk that individuals will be needlessly incarcerated

INS recognizes the risk of erroneous deprivation of personal liberty resulting from the non-individualized nature of its regulation. It simply asserts, without an evidentiary basis, that erroneous deprivation will be "rare." Pet. Bf. at 25, n. 16. It will only be as rare as INS limits its arrests to deportable aliens. The vast majority of INS arrests are conducted without warrant, often during work place "raids" during which "conditions are understandably chaotic . . ." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

The only "procedural protection" offered to avoid erroneous detention without bond is seemingly the on-the-spot determination by a local INS officer that someone found working during an INS enforcement

operation is doing so without a right to do so. The officer will seemingly make a judgment call regarding the likely outcome of the person's pending deportation hearing. If the officer believes the INS will win the deportation hearing several months or years down the road, he will conclude the person has no right to be employed and effect his detention without bond for violation of the original bond condition.

As this Court has repeatedly held, such a determination, even if based upon probable cause, cannot constitutionally serve as a predicate for prolonged detention. *Gernstein v. Pugh*, 420 U.S. 103, 113-14 (1975); *County of Riverside v. McLaughlin*, __ U.S. __, 111 S.Ct. 1661 (1991).

The INS seeks to overcome this procedural void by permitting individuals to apply for "discretionary" work authorization. To begin with, such work authorization is available only after an arrestee is released (on condition, of course, that he or she not work before applying for and receiving the permission to do so). 8 C.F.R. § 274a.12(c)(13). For the many individuals who cannot deposit bail in cash, this first hurdle is effectively insurmountable: bonding companies uniformly refuse to underwrite bail bonds for respondents whose release is conditioned on unemployment. C.R. 4, Exhibits B and C ("Bond companies have made clear that they will not place bonds ... if the condition of the bond prohibits the client from employment"). *See also* Pet. App. at 17a, n. 7 (court of appeals notes that large numbers of people will be unable to "secure immigration bonds and will be detained indefinitely"). Eleven of the plaintiffs were in INS detention, unable to secure their release because of the challenged regulation when this lawsuit was commenced. C.R. 13 at 8-16.

Further thinning the ranks of individuals who could ever hope to qualify for discretionary work authorization, INS regulations insist that an applicant "establish compelling reasons for granting

employment authorization." 8 C.F.R. § 103.6(a)(2)(iii) (1989) (emphasis added). In practice the INS has proved unflaggingly faithful to the parsimonious terms of its regulation.[23]

The regulations themselves allow the INS up to 60 days within which to adjudicate applications for employment authorization. 8 C.F.R. § 274a.13(d). Sixty days is clearly not a short time to be erroneously deprived of the right to work. The uncontroverted record, however, establishes that the agency routinely delays 7-8 months before deciding applications for employment authorization. C.R. 16, Exhibit CC; *id.* Exhibit RR ("Based on current practice [in San Francisco] ... it could take years before ... applications for permission to work would be adjudicated"). *See also Doe v. Meese*, 690 F.Supp. 1572 (S.D. Tex. 1988) (INS failing to adjudicate request for employment authorization within regulatory time limits); *Mendez v. Thornburgh*, No. 88-04995-TJH (C.D. Cal) (class action challenge to INS's failure to adjudicate requests for work authorization within regulatory time limits).

No due process attaches to a determination of an application filed by a class member. There is no hearing, no independent decision-maker, no witnesses, no opportunity for rebuttal of derogatory evidence and no record. There might, sometimes, be an informal interview.

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23 *See, e.g.*, C.R. 16, Exhibit GG (Los Angeles District Office has "blanket policy" to deny applications for discretionary work authorization); C.R. 16 (Exhibit CC ¶ 4) (8 months to receive a decision); C.R. 16 (Exhibit DD, ¶ 4[g]) (no criteria; 80% denial rate); C.R. 16 (Exhibit GG, ¶ 4) (same); C.R. 16 (Exhibit OO ¶ 6) (same); C.R. 16 (Exhibit PP ¶s 7-9) (same); C.R. 16 (Exhibit RR ¶ 5) (often takes "years" to receive a decision). *See also Ramos v. Thornburgh*, 732 F.Supp. 696 (E.D. Tex. 1989) (INS overly stringent in adjudicating applications for employment authorization); *Diaz v. INS*, 648 F.Supp. 638 (E.D. Cal. 1986) (INS considers impermissible factors in denying applications for employment authorization).

In short, "discretionary" work authorization is but a carrot on a stick, a specter of due process.

Incarceration for violation of no-work conditions is similarly imposed with utter disregard for fair procedure. INS regulations prescribe the "process" as follows:

> When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, or officer in charge [*i.e.*, chief border patrol agent, deputy chief patrol agent, associate chief patrol agent, or assistant chief patrol agent] . . . in which event the alien may be taken into physical custody and detained.

8 C.F.R. § 242.2(e) (emphasis added). *Compare* 18 U.S.C. § 3148 (bail may be revoked only "after a hearing" in which judicial officer finds "clear and convincing evidence that the person has violated . . . condition of release").

That an individual's most precious personal liberty could be violated at the unfettered discretion of this long list of administrative functionaries might be expected in the pages of Kafka, but not in the United States. In addressing the analogous authority of Article III judges, this Court cautioned,

> A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial. For this purpose, he has the power to revoke bail and to remit the defendant to custody. But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial.

Bitter v. United States, 389 U.S. 15, 16-17 (1967) (emphasis added). The Court held that revoking bail cannot be tolerated unless (1) a hearing, and (2) a statement of the court's reasons for revoking bail are first provided. *Id.*

True, pursuant to 8 C.F.R. § 242.2(d), an individual whose freedom is summarily revoked for working may petition for a "redetermination" hearing before an administrative judge. 8 C.F.R. § 242(b). But once an individual manages to request a redetermination, he or she must wait from a few days to "two months or more" before actually receiving that procedure. RT II at 29; RT II at 138. And, without the ability to work, the procedure would have to be invoked by most people without the assistance of counsel.

The INS itself characterized bond redetermination as "informal" and not a due process hearing. R.T. 130, line 15.[24] No record is made: "The Government has never represented . . . that a transcript was made of the bond hearing." R.T. at 19, lines 11-14. The person incarcerated is not permitted to testify, present witnesses, or rebut derogatory evidence. E.R. 18-19, C.R. 16 Exhibit AA ¶¶ 10-11; E.R. 23, C.R. 16 Exhibit DD at 11; R.T. 130, line 15; R.T. 32, line 22; R.T. 42, lines 3-14; R.T. 130, Line 20; R.T. 132, line 16.

As the district court held, the administrative avenues available to a person whose bond is revoked for working are "not designed to comport with due process requirements . . ." App. Pet. 117a. The district court concluded that the INS's procedural scheme posed a "significant risk of erroneous deprivation . . ." *Id.*

In sum, plaintiffs and their class members may be summarily re-arrested for allegedly violating a no-work

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24 *See also* R.T. 32, line 22; R.T. 42, lines 3-14; R.T. 130, line 20; R.T. 132, line 16; C.R. 16 (Exhibit AA at 3); C.R. 16 (Exhibit DD at 11 lines 6-28).

condition without the INS's ever having to convince a neutral or detached decision-maker that the individual is an alien, deportable, a danger to the public, or in fact has worked or will work without authorization if enlarged on bond. There is no prompt due process hearing at which someone detained under the no-work regulation may challenge his or her detention.

The second element of the *Mathews* due process formulation, therefore, strongly disfavors the blanket imposition of no-work restrictions on release.

3. The Government's interest in imposing a blanket no-work condition is attenuated at best

The Government's interest in a blanket approach to detention and bond, meanwhile, is *de minimus*. To begin with, providing some type of due process hearing before imposing no-work conditions or detention for their violation would place no great administrative burden on the INS: the vast majority of persons the INS arrests—over 97.5 percent—"voluntarily depart" the United States without ever seeking release on bond at all. *INS v. Lopez-Mendoza*, 468 U.S. at 1044. For those few remaining individuals who do seek release, there could hardly be any greater fiscal or administrative burden in determining whether a no-work condition is warranted in an individual case than there is in detaining that individual for months on end. Indeed, in more sober times the INS acknowledged as much.

In *Toscano-Rivas*, the Attorney General held that a no-work bond condition cannot be imposed without adequate "safeguards." 14 I&N Dec. at 556-57. According to the Attorney General, regulations must limit "the circumstances which might result in imposing an employment condition. Such standards would provide guidance to Service personnel ... and would be a safeguard against abuse of discretion." *Id.* at 557. As we have discussed above, between 1974

and 1983 the INS adhered to regulations, promulgated after the Attorney General's decision in *Toscano-Rivas*, that required individualized determinations and the consent of an INS regional commissioner before barring employment.

In 1983, the INS suddenly decided that its former procedures were too "burdensome." However, no proof of this assertion has ever been presented, for none exists. For its part, the Board of Immigration Appeals characterized these procedures as allowing for "prompt and equitable bond determinations." *Matter of Leon-Perez*, 15 I&N Dec. 239, 241 (BIA 1975) (emphasis added). The Board, speaking for the Attorney General, thoughtfully acknowledged that unless individual factors are weighed, a no-work condition could needlessly force the individual to "choose between violating the employment condition of his bond in order to support himself, seeking social assistance, or absconding . . ." *Id.* at 242-243.

The INS's reasons for abandoning this prior practice remain an enigma. In over eight years of litigation, the INS failed to produce any evidence that its pre-1982 practice of imposing no-work conditions in individual cases was in fact burdensome. What prior INS practice does make abundantly clear, however, is that the agency is well-able to provide meaningful process before imposing no-work conditions.

Secondly, unlike society's ancient and universal interest in protecting the citizenry from violent crime and the nation from subversion, the governmental interest in barring the employment of unauthorized workers is qualified at best. Regulating the employment of unauthorized aliens has only been of public interest since enactment of the IRCA in 1986, and even now alien employment is hardly deemed so pernicious as to warrant a categorical ban: the IRCA provides that continuing to employ unauthorized workers hired before November 6, 1986, is permissible, Immigration Reform and Control Act of

1986, Pub.L. 99-603, § 101(a)(3), 100 Stat. 3360 (1986), as is hiring unauthorized workers as "independent contractors" or "casual domestic" laborers. 8 C.F.R. § 274a.1.(f). Similarly, Congress has permitted agricultural employers to continue to employ unauthorized workers long after other employers were barred from doing so. 8 U.S.C. § 1324a(i)(3)(A). In short, Congress's qualified prohibition on the employment of unauthorized aliens belies any attempt to equate working with dangerous crime or subversion threatening the life of the nation.[25] The final element of the *Mathews* test, then, also weighs against the INS's indiscriminate imposition of no-work conditions.

4. Administrative agencies may regulate economic activities through blanket rules, but impairing personal liberty through a blanket bond condition is impermissible

The INS points to decisions involving administrative rulemaking in the sphere of economic regulation, *e.g.*, *American Hospital Association v. NLRB*, __ U.S. __, 111 S.Ct. 1539 (1991), to support its notion that detention may be prescribed by rule for a broad class of individuals. This reliance is misplaced.

In *American Hospital Association*, this Court upheld a NLRB rule generally limiting to eight the

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25 Even where the governmental interest in protecting the citizenry from violent criminals is at stake, this Court has approved extended restraints on personal liberty only following a due process hearing. *United States v. Salerno*, 481 U.S. 739 (1987). *See also* S. Rep. No. 98-225, at 8 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3191 (pretrial detention constitutionally defective unless (1) imposed with adequate procedural safeguards, and (2) limited to those cases in which detention is strictly necessary to serve important societal interests).

number of bargaining units it would recognize at any given acute care hospital. The Board's purpose was to balance the right of hospital employees to define their own bargaining units with their employers' interest in negotiating with a manageable number of bargaining units. 111 S.Ct. at 1544-45. Nothing prevented the Board from "'supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents . . .'" *Id.* at 1543 (quoting K. Davis, *Administrative Law Text* 145 (3d ed. 1972)).

Unlike *American Hospital Association*, neither experience, analysis, nor reason supports the regulation here at issue. The INS has managed to produce no evidence that jailing a class of individuals is warranted by any substantial administrative concern (or even that its regulation would contribute anything to the employment of U.S. citizens).

Perhaps more importantly, the *Mathews* due process formulation turns in great part on the importance of the individual right at stake. Here we do not speak of bargaining units—we speak of the bodily freedom of individual human beings.

However much the Attorney General may be empowered to impose no-work conditions in proper cases, that power should be exercised with due regard for the freedom of the individual against whom it is applied. If an administrative agency is to commit an individual to an indefinite period in jail without trial, it should, at a minimum, show in a due process hearing that permitting that person to remain free on bond would be inimical to the public good. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963). This nation's historic solicitude for individual freedom simply cannot be squared with the INS's interpretation of § 242(a) as comprising an undiscriminating, unindividualized class determination to condition the freedom of virtually every individual it

arrests on the withdrawal from work.

B. The Detention Caused by the Challenged Regulation Constitutes An Impermissible Penalty

The challenged regulation appears to be unconstitutionally punitive as well. This Court has consistently affirmed that "under the Due Process Clause, a [person] may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

The INS would now imprison alleged immigrants for working in the United States without authorization. No legislature has made working a crime, nor has any elected body declared incarceration the penalty for such an "offense." Here the INS, by dint of administrative discretion, has taken it upon itself to decree work an offense and to prescribe incarceration as its punishment—all without trial or other due process. In so doing, the agency exceeds the bounds of the Due Process Clause of the Fifth Amendment.

"To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." *United States v. Salerno*, 481 U.S. 739, 747 (1987). In its comments to the final regulation the INS declared that its no-work rule will punish un-authorized workers who take jobs. Without a no-work prohibition, the agency reasoned, "upon release, the [person] could simply continue his employment with impunity ..." 48 Fed. Reg. 51,144 (1983); Pet.App. 140a (emphasis added).[26] The intent of the no-work regulation, then, is expressly punitive. The INS wishes to re-incarcerate persons released on bond

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26 Of course, through its system of employer sanctions, Congress has effectively addressed the possibility that an individual released on bond might engage in unauthorized work.

who work so that their working will not go with "impunity": that is, "protection from punishment." *Black's Law Dictionary* at 891 (4th ed. 1968).

But even absent such an express punitive intent, due process protects against penalty-in-fact:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter* *** whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry . . .

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Under *Mendoza-Martinez* the INS regulation is palpably punitive.

Firstly, there is no question but that imprisonment involves an affirmative disability or restraint that has historically been regarded an infamous punishment. *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896). Secondly, the regulation looks to a past infraction—working—as a basis for imposing a future disability—imprisonment. Under the regulation, the INS will deny release to anyone who refuses to accept unemployment as a condition of release. Where the individual accepts this condition and is released, working without first obtaining permission results in re-arrest and incarceration.

Because the regulation prescribes imprisonment for a past act that has nothing to do with the imprisoned individual's availability for deportation, it is operationally punitive. *Bitter v. United States*, 389 U.S. 15, 17 (1967).

Jailing individuals to keep them from delaying deportation is patently excessive: no individual has any right to delay deportation proceedings except "for

good cause shown." 8 C.F.R. § 242.13 (1990).[27] Predictably, there is absolutely no evidence in the record that the regulation furthers this asserted purpose. Similarly, there is no evidence that the challenged regulation in any way creates job opportunities for American workers.

In *Bitter v. United States*, 389 U.S. 15 (1967), the trial judge revoked the bail of a defendant who returned 45 minutes late from a recess. This Court held such bail revocation unconstitutionally punitive:

> A trial judge indisputably has broad powers to ensure the orderly and expeditious progress of a trial *** But this power must be exercised with circumspection. It may be invoked only when and to the extent justified by danger which the defendant's conduct presents or by danger of significant interference with the progress or order of the trial. *** [T]he trial judge's order of commitment *** had the appearance and effect of punishment rather than an order designed solely to facilitate the trial. Punishment may not be so inflicted.

389 U.S. at 16-17 (emphasis added). As in *Bitter*, here the INS would jail individuals released on bail entirely without hearing or any statement of reasons for commitment. Such incarceration would have nothing to do with protecting the integrity of the administrative deportation process. Jailing individuals who work in violation of the INS's wishes, therefore, is transparently punitive—and unconstitutional.

CONCLUSION

The decision of the Court of Appeals should be affirmed. If the decision is reversed, the case should

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27 *See also* 8 U.S.C. § 1252b(d) (Attorney General may sanction frivolous delay); 8 C.F.R. § 3.1(d)(1-a)(iv) (BIA may dismiss frivolous appeal of order of deportation).

be remanded to the district court for trial on plaintiffs' constitutional claims.

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